2011

North Fork Special Service District v. Robert Bennion : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

NORTH FORK SPECIAL SERVICE DISTRICT, Plaintiff/Appellee, vs. ROBERT BENNION, Defendant/Appellant.	Case No. 20111026-CA

BRIEF OF APPELLANT

APPEAL FROM A FINAL ORDER OF SUMMARY JUDGMENT OF THE FOURTH DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE STEVEN L. HANSEN PRESIDING

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a final order of summary judgment of the Fourth District Court, in and for Utah County, State of Utah, the Honorable Steven L. Hansen presiding. This Court has jurisdiction pursuant to UTAH CODE ANN. §§ 78A-3-102(4) (2009) and. 78A-4-103(1)(j) (2009).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

Issue No. 1: Did the trial court err in awarding Plaintiff summary judgment as a matter of law where Plaintiff's water overuse fees are limited by Utah law?

Standard of Review: A district court's grant of summary judgment is reviewed for correctness, affording no deference to the court's legal decisions. *Davis County Solid Waste Mgmt. v. City of Bountiful*, 2002 UT 60, ¶ 9, 52 P.3d 1174. "[A] district court's interpretation of a statutory provision is a question of law that [an appellate court] review[s] for correctness. *Id.* This issue was preserved in the proceedings pertaining to Mr. Bennion's motion to dismiss and then again in the proceedings pertaining to NFSSD's motion for summary judgment. *See* R. 72-75, 246-47, 262.

Issue No. 2: In light of Plaintiff's easement to repair the Property's lateral water line, did the trial court err in finding as a matter of fact and law that Mr. Bennion was responsible to maintain and repair the Property's leaky lateral water pipeline, and that Mr. Bennion was liable to pay overuse charges related to those leaks?

Standard of Review: "To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings." *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). This issue was preserved in Mr. Bennion's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. *See* R. 241-42; 254-56.

Issue No. 3: Given that Mr. Bennion's defenses are meritorious, did the trial court err in awarding Plaintiff its attorney's fees pursuant to UTAH CODE ANN. § 78B-5-825?

Standard of Review: "With regard to the award of attorney fees, whether a claim is 'without merit' is a question of law [an appellate court] review[s] for correctness." *In re Olympus Constr., L.C.*, 2009 UT 29, ¶ 8, 215 P.3d 129. This issue was preserved in Mr. Bennion's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. *See* R. 241-42, 250-51.

APPLICABLE STATUTES AND RULES

The following statutes and rules are reproduced in **Addendum A**:

UTAH CODE ANN. § 17A-1-205 (2004);
UTAH CODE ANN. § 17A-2-1320 (2007);
UTAH CODE ANN. § 17B-1-904 (2007);
UTAH CODE ANN. § 17B-1-904 (2011);
UTAH CODE ANN. § 17B-2-804 (2004);
UTAH CODE ANN. § 17D-1-106 (2011);
UTAH CODE ANN. § 78B-5-825 (2008); and
UTAH R. CIV. P. 56(c)

STATEMENT OF THE CASE

On February 29, 2008, Plaintiff North Fork Special Service District filed a Complaint against Defendant Robert Bennion, in the Fourth Judicial District Court, State of Utah, the Honorable Steven L. Hansen presiding. R. 1-6. Mr. Bennion filed his Answer to the Complaint on May 21, 2008. R. 10-20. On May 27, 2008, Mr. Bennion filed a Motion to Dismiss the Complaint, which motion was also later briefed to the court through court-ordered supplemental briefing. R. 21-27, 58, 151-55. Defendant's motion to dismiss was granted in part and denied in part. R. 58, 151-55. Plaintiff filed a motion for summary judgment on May 19, 2010, which motion was heard by the trial court on

June 8, 2011. R. 170-209, 445. On October 13, 2011, the trial court entered its Findings of Fact and Conclusions of Law on Plaintiff's Motion for Summary Judgment, and an order granting summary judgment in favor of Plaintiff. R. 406-13, 422-25. Mr. Bennion timely filed a notice of appeal with the trial court on November 10, 2011. R. 440-41.

STATEMENT OF FACTS

In 1998, Defendant Robert Bennion permanently shut off water to his mountain home. R. 77. In 2006 Plaintiff North Fork Special Service District ("NFSSD") was awarded a temporary easement for the purpose of repairing and replacing Mr. Bennion's leaky lateral waterline. R. 102-05, 224-28. Despite those facts, NFSSD recently obtained a judgment against Mr. Bennion primarily for water overuse fees and interest pertaining to leaks in Mr. Bennion's lateral waterline for the period of February 28, 2004 through March 31, 2009, in the amount of $171,559.10. *See* R. 406-13.

* * *

NFSSD was organized on October 7, 1977 by resolution of the Utah County Commission. R. 5, 208, 261, 412. NFSSD provides water, sanitation, and fire protection services to properties located within its boundaries. R. 5, 206, 261, 412. From approximately 1993 to March 31, 2009, Mr. Bennion owned mountain property including a residence located at 9403 Canopy Lane, in Utah County, State of Utah (the "Property"). R. 5-6, 19, 208, 206, 259, 412. The Property is located within the boundaries of NFSSD. R. 5, 19, 208, 259, 412.

Factual Background[1]

Prior to Mr. Bennion's ownership of the Property, during the 1980s developer C. Robert Redford contracted with Utah County to develop a recreational resort with property he owned in the North Fork of Provo Canyon. R. 80. As part of that development agreement Redford promised Utah County that he would construct, at his own expense, a compliant culinary water system. *Id.* Once built, the homeowners' association would assume responsibility for maintenance of the water system. *Id.* Redford posted a bond for the water improvements, but then failed to construct the culinary water system. *Id.* Utah County elected not to collect on the bond. *Id.* Mr. Bennion's Property is located just outside of the Redford development. R. 79.

During that same period of time, the previous owner of Mr. Bennion's Property permitted an adjacent landowner named Bebert, to temporarily connect to the Property's water system. R. 80. The plan was to permit Bebert to draw water from the Property's system until he could construct a permanent water system on his own land the next spring. *Id.* Because at this time NFSSD owned enough water shares sufficient to meet the needs of its users and because there were sufficient tax revenues to cover the costs of maintenance and upkeep of NFSSD's water system, there were no water meters on the Property. R. 79-80.

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[1] The information contained in the factual background cited in this brief primarily comes from facts provided to the trial court by Mr. Bennion in his Supplemental Memorandum in Support of Defendant's Motion to Dismiss, which facts were not objected to or disputed by NFSSD in its opposing memorandum. *See* R. 76-80, 101-32.

In or around 1993, when Mr. Bennion owned the Property, Dr. Pamela Vincent purchased land in Redford's development. R. 79. Because Redford had failed to construct the agreed-upon culinary system for his development, Vincent had no source of water. *Id.* For that reason, Vincent was granted a conditional building permit. *Id.* Upon completion of construction of her home, and with the advice and consent of agents of NFSSD, Vincent hired a contractor to tap into the temporary water line running from Mr. Bennion's waterline into the Bebert property. *Id.* Vincent's connection to Mr. Bennion's waterline was made without a permit, was not to code, and was never properly inspected for compliance with current law. *Id.*

Additionally, at or around this period of time, NFSSD claimed that the tax revenues it received no longer covered its expenses, and thus began charging property owners for water and other services. *Id.* Consistent with that intent, NFSSD installed water meters at Vincent's home and at the juncture between Mr. Bennion's pipeline and the main line. *Id.* Vincent was billed for the water passing through her meter, and Mr. Bennion was billed for the balance of the water passing through the meter at the main line juncture. *Id.* Because NFSSD could not determine how much water the Bebert home used, NFSSD either charged Bebert nothing or charged only a minimum access charge. *Id.*

In the winter of 1998, Mr. Bennion's pipeline on the Property began to develop serious leaks. R. 78. NFSSD advised Mr. Bennion that it was his duty to repair the pipeline. *Id.* To stop the loss of water, Mr. Bennion shut off the water where his pipeline

connected into the main water line. *Id.* Because Vincent had tapped into the Bebert extension to Mr. Bennion's private pipeline, Mr. Bennion's act of shutting off his water also terminated water service to Vincent's home. *Id.*

Without any water, Vincent filed suit against Mr. Bennion in the Fourth District Court for the State of Utah, Case No. 980405600. *Id.* Among other claims, Vincent sought an injunction barring Mr. Bennion from turning off his water. *Id.* Mr. Bennion counterclaimed for an injunction ordering Vincent to cease using his private waterline. *Id.* He also joined NFSSD as a third party defendant and sought an injunction ordering NFSSD to cease using his personally owned waterline to deliver water to NFSSD's other customers. *Id.* On September 21, 1998, the court awarded Vincent a temporary restraining order enjoining Mr. Bennion from shutting off his water during the pendency of the action. *Id.* However, because Mr. Bennion lacked sufficient funds to continue the litigation, his counsel withdrew leaving Mr. Bennion to represent himself. R. 77-78. Mr. Bennion did not timely respond to requests for discovery, and as a result, the court struck Mr. Bennion's pleadings and dismissed Mr. Bennion's counterclaim with prejudice. R. 77.

In 1998 Mr. Bennion stopped using his Property. *Id.* Additionally, in 1998 Mr. Bennion shut off the valve where the water enters his home, and has not used any water to the Property since that time. *Id.* Mr. Bennion repeatedly notified NFSSD that he does not wish to receive water service. *Id.*

On March 29, 2002, NFSSD sued Mr. Bennion in the Fourth District Court for the State of Utah, Case No. 020100735, claiming $16,000.00 in past due charges for services rendered. *Id.* This case number was later changed to Case No. 040401235. *Id.* Of the damages sought by NFSSD, $11,000.00 was demanded for excess water that had allegedly leaked from Mr. Bennion's waterline during the winter of 1997-98. *Id.* The remaining balance was for access charges (i.e. base fees for having access to water services), fire protection, trash removal services, and interest and finance charges. *Id.* Although Mr. Bennion counterclaimed for damages, his counterclaim was dismissed for failure to file a notice of claim. R. 77, 114-15; 110-12. The court also held that Mr. Bennion could have brought this claim for damages in the *Vincent v. Bennion* case, but did not do so, and was therefore barred by res judicata from bringing those claims in Case No. 040401235. *Id.* As a result, on January 24, 2006, NFSSD in addition to the $11,000.00 for excess water fees, NFSSD was awarded $3,524.31 for base user fees for the period of January 1, 1997 through January 25, 2002. R. 76-77.

On May 25, 2006, NFSSD again sued Bennion in the Fourth Judicial District Court, Case No. 060401631. R. 76, 105. This time NFSSD sought to condemn an easement across Mr. Bennion's Property for the purpose of constructing a waterline into Redford's development to service NFSSD's customers including Vincent. *Id.* Mr. Bennion again counterclaimed, seeking an injunction barring NFSSD from using public monies to condemn an easement to benefit a private developer. *Id.* Mr. Bennion also sought an injunction barring NFSSD from using his water pipeline without his consent or

authorization. *Id.* NFSSD then filed a motion for immediate occupancy of the Property. *Id.*

In response to NFSSD's motion, Judge Anthony Schofield issued a Ruling dated September 22, 2006 (the "September 22, 2006 Ruling"). R. 105. In its ruling, the court found that the waterline that crosses the Property is leaking and losing hundreds of gallons of water each week. R. 102-05, 224-28. Further, the court noted NFSSD's representations that it was not planning to repair the existing pipe, but rather that it planned to install a new waterline. R. 103, 226. However, NFSSD also represented that a new waterline could not be installed before winter and would require that NFSSD immediately make emergency repairs to Mr. Bennion's waterline. *Id.* Acting under the belief that the granting of NFSSD's request for immediate occupancy would be the best way to halt additional water loss, the court granted NFSSD the right to immediate occupancy of Mr. Bennion's Property through which Mr. Bennion's waterline travels. R. 102-03, 225-26. Further, the court granted NFSSD temporary ownership of the waterline during the pendency of the condemnation case—stating that whether NFSSD begins construction immediately or simply uses the Order of Immediate Occupancy to begin preliminary work on the Property is within NFSSD's discretion. R. 76, 103, 226.

The Instant Case

On February 29, 2008, NFSSD filed a complaint against Mr. Bennion in the instant case, alleging a failure to pay special service district fees for the period of January 26, 2002 to the present, unjust enrichment and $250,000.00 in punitive damages. R. 1-6.

After answering the Complaint, Mr. Bennion filed a motion to dismiss arguing that absent a tort claim NFSSD was not entitled to punitive damages, and that NFSSD's claims are barred by the applicable statute of limitations. R. 21-27. NFSSD opposed Mr. Bennion's motion to dismiss and a hearing was held on August 25, 2008. R. 33-40, 58. At the hearing, the trial court dismissed NFSSD's claim for punitive damages and ordered the parties to provide supplemental briefing as to the applicability of UTAH CODE ANN. § 17B-1-904, which limits the amount a local district can collect from a residential customer for past due service fees to $200 per month. R. 58, 81. The trial court also ruled that a four year statute of limitations applies to the instant case. *See* R. 132.

On September 2, 2008, Mr. Bennion filed his supplemental memorandum in support of his motion to dismiss with the trial court. R. 62-81. In his supplemental pleading, Mr. Bennion argued that because the Property is residential, NFSSD's service fees, collection costs, interest, court costs, reasonable attorney's fees and damages may not exceed $200 per month as prescribed by UTAH CODE ANN. § 17B-1-904, which was enacted by the Utah State Legislature on May 3, 2004. R. 75. Additionally, Mr. Bennion argued the retroactive applicability of UTAH CODE ANN. § 17D-1-106, which makes the provisions of UTAH CODE ANN. § 17B-1-904 applicable to special service districts such as NFSSD, and which was enacted on May 5, 2008. *See* R. 72-74.

In response, NFSSD claimed that the Utah State Legislature did not make Section 17B-1-904 applicable to special service districts until May 5, 2008 as per the language of UTAH CODE ANN. § 17D-1-106, which designation occurred shortly after this case was

filed on February 29, 2008. R. 131. Further, NFSSD asserted that pursuant to UTAH CODE ANN. § 63-3-3, statutes are not to be applied retroactively, unless expressly so declared by the Legislature. *Id.* As exhibits to its opposition memorandum, NFSSD provided the trial court with various pleadings from the previous cases cited above, including Judge Schofield's September 22, 2006 Ruling. *See* R. 102-21.

In reply to NFSSD's opposition memorandum, Mr. Bennion provided the trial court with the legislative history surrounding Sections 17B-1-904 and 17D-1-106. R. 140-43. In particular, Mr. Bennion informed the court that UTAH CODE ANN. § 17A-2-205 (enacted on May 3, 2004) was the predecessor of Section 17D-1-106, and contained express language noting that special service districts were bound by the $200 monthly fee limitation prescribed by UTAH CODE ANN. § 17B-2-804, which was the predecessor statute to Section 17B-1-904. *Id.* Additionally, because the predecessor Sections (i.e. Sections 17A-2-205 and 17B-2-804) were in effect from May 3, 2004 to April 30, 2007, Mr. Bennion asked the court to, at a minimum, limit NFSSD's fees to $200 per month during that period of time. *Id.*

With the parties' supplemental briefs before it, the trial court issued a Decision on September 25, 2008. R. 151-55. The court determined that UTAH CODE ANN. § 17B-1-904 does not apply to limit NFSSD's damages to $200. R. 154. In rendering that decision, the trial court essentially adopted NFSSD's position as stated in its supplemental opposition brief. *See* R. 152-55. Further, the court found that UTAH CODE ANN. § 17A-2-1320, which was repealed May 5, 2008, and which authorized a special

service districts to pass a resolution or ordinance imposing fees of charges for services provided by the district, was applicable to this case. R. 152-53. The court denied Mr. Bennion's motion to dismiss, but did not rule on whether Sections 17A-2-205 and 17B-2-804 limited NFSSD's fees to $200 during the period of May 3, 2004 to April 30, 2007. *See* R. 151-55.

On May 17, 2010, after a long period of inactivity in the case, NFSSD filed a motion for summary judgment, claiming that there are no material facts in dispute and that NFSSD is entitled to judgment as a matter of law. R. 167-209. In arguing its motion for summary judgment, NFSSD claimed that Mr. Bennion did not pay and is liable for $3, 711.00 in base user fees for water, fire protection and sanitation services provided by NFSSD to the Property for the five-year period of February 28, 2004 through March 31, 2009. R. 200-01. Additionally, NFSSD claimed Mr. Bennion did not pay and is also liable for water overuse of greater than 5,000 gallons per month from February 28, 2004 through March 31, 2009, at an amount of $95,330.38, plus interest at the rate of 12% per annum. R. 199-200. At the time of its motion, the interest sought by NFSSD totaled $47,968.42 for the period of April 30, 2004 through May 14, 2010. R. 197.

In addition to those arguments, in his motion for summary judgment NFSSD also claimed that given Mr. Bennion's alleged bad faith actions in this and in prior cases, NFSSD was entitled to an award of attorney's fees and costs pursuant to UTAH CODE ANN. § 78B-5-825. R. 198. In support of that argument, NFSSD claimed that it notified Mr. Bennion of his obligation to pay user fees and yet was forced to pursue litigation for

over eight years in an attempt to obtain those fees and for the purpose of obtaining injunctive relief over threats made by Mr. Bennion. *Id.* NFSSD further alleged that because it had been awarded judgment against Mr. Bennion for its fees for the period of November 1997 through May 1, 1998 in a prior case (Case No. 040401235), that Mr. Bennion's defense of the instant case constituted bad faith. R. 177-82, 198.

As an exhibit to its motion for summary judgment, NFSSD submitted statements of its charges as invoiced to Mr. Bennion for the period of February 28, 2004 through March 31, 2009. R. 173-75. Additionally, NFSSD submitted the declarations of Rashell Anderson, the District Clerk for NFSSD, and of David Boshard, the Director of Services of NFSSD. R. 185-95. Those declarations each contain the following chart, which illustrated the particular periods of time and amounts for which water overuse fees were assessed by NFSSD to the Property:

Dates Covered	Gallons	Excessive Use Charge
Feb. 2004 — Apr. 2004	Interpolation of total	$ 628.00
May 2004 — Oct. 2004	450,000	$ 1,614.50
Oct. 2004 — Apr. 2005	610,000	$ 3,000.00
May 2005 — Oct. 2005	938,568	$6,271.06
Oct. 2005 — Apr. 2006	3,167,900	$23,858.18
May 2006 — Oct. 2006	2,433,500	$18,230.00
Oct. 2006 — Apr. 2007	3,655,600	$27,512.32
May 2007 — Oct. 2007	2,419,700	$14,215.82

R. 186, 192.

In response to NFSSD's motion for summary judgment, Mr. Bennion disputed that his participation in prior litigation initiated by NFSSD constituted bad faith sufficient to award NFSSD attorney fees under Section 78B-5-825. R. 249-50. Mr. Bennion also

argued that summary judgment was improper as a matter of law because UTAH CODE ANN. §§ 17B-2-804 and 17A-1-205 apply to this case. R. 246-47. Mr. Bennion explained to the court that Section 17B-2-804, which was enacted by the Utah Legislature on May 3, 2004, limits the service fees and interest that a local district can charge a residential customer to $200 per month, was the law of this State from May 3, 2004 until April 30, 2007. *Id.* Furthermore, Mr. Bennion argued that Section 17A-1-205, made the limitations of Section 17B-2-804 applicable to special service districts including NFSSD. *Id.* Lastly, as an exhibit to his opposition memorandum Mr. Bennion provided Judge Schofield's September 26, 2006 Ruling, granting NFSSD an easement of immediate access to repair and/or replace Mr. Bennion's leaking lateral water pipeline. R. 225-28

After a hearing on NFSSD's motion for summary judgment on June 8, 2011, the trial Court granted NFSSD's motion for summary judgment. R. 445:25-26. Additionally, upon a motion from NFSSD, the court struck Mr. Bennion's statutory arguments as redundant. *See* R. 445:25. On October 13, 2011, the trial court issued its Findings of Fact and Conclusions of Law. R. 406-13. The court concluded that Mr. Bennion is the owner of the lateral waterline found on his Property, and that Mr. Bennion is responsible for the maintenance of that waterline. R. 409. Further, the court ruled that for the four-year period of February 28, 2004 through March 31, 2009, Mr. Bennion owes NFSSD $3,711.00 in base user fees, $95,330.38 for excess water usage fees, $61,155.22 in interest at the rate of 12% per annum for the period of April 30, 2004 through June 8, 2011, and $11,362.50 in attorney's fees pursuant to Section 78B-5-825. R. 408-09. The

court also ruled that NFSSD was entitled to continuing interest at the rate of 12% per annum. R. 408. NFSSD's judgment amount totals $171,559.10. R.422-25.

ARGUMENT SUMMARY

POINT I: On summary judgment the trial court awarded NFSSD $156,485.60 in total service fees and interest for a four-year period of time from February 28, 2004 through March 31, 2009. In rendering that decision, the trial court overlooked binding Utah law, which serves to limit NFSSD's service and interest fees chargeable to Mr. Bennion to a maximum amount of $200 per month for the applicable periods of time. As a general rule, a party is entitled to have its rights determined on the basis of the law as it existed at the time of the occurrence. Accordingly, for the three-year period from May 3, 2004 through April 30, 2007 in which UTAH CODE ANN. §§ 17B-2-804 and 17A-1-205 were in effect, NFSSD's service fees of $80,486.56 as well as 12% in interest charges for that period should be reduced to a maximum of $7,200.00 ($200 multiplied by 36 months). Additionally, in light of NFSSD's current $200 monthly limitations on interest charges as prescribed by UTAH CODE ANN. §§ 17B-1-904 and 17D-1-106, the trial court erred in awarding NFSSD interest in excess of that amount for the period of May 8, 2008 to the present. May 8, 2008 was the date that Section 17B-1-904's interest fee limitations became binding upon NFSSD. Given the trial court's failure to apply binding Utah law, NFSSD's grant of summary judgment should be reversed.

POINT II: Also on summary judgment, the trial court determined that Mr. Bennion was responsible to maintain the lateral waterline on his Property, and that he

was liable to pay NFSSD $41,728.14 plus interest for the water that leaked from the Property's lateral waterline from September 26, 2006 through October 2007. The court rendered this decision while holding in its hand Judge Anthony Schofield's prior September 26, 2006 Ruling, in which he granted NFSSD an immediate occupancy easement for the purpose conducting emergency repairs to the profusely leaking waterline. Additionally, the trial court overlooked longstanding Utah precedent requiring an easement holder, such as NFSSD, to maintain its easement regardless of the servient landowner's use of that easement. Where the facts and the law demonstrate that it was NFSSD, and not Mr. Bennion, that was responsible for repairing the Property's leaky waterline, and that NFSSD failed to timely make those repairs, the trial court erred in assessing liability to Mr. Bennion for the water overuse charges awarded to NFSSD from September 26, 2006 through October 2007.

POINT III: At hearing on NFSSD's motion for summary judgment, the trial court found that Mr. Bennion's defenses were asserted in bad faith and granted NFSSD's demand for attorney's fees of $11,362.50 pursuant to UTAH CODE ANN. § 78B-5-825. In rendering that decision, however, the court overlooked the requirement that Mr. Bennion's claims be without merit. As is demonstrated by Points I and II, Mr. Bennion's claims have merit and NFSSD is therefore not entitled to an award of attorney's fees pursuant to Section 78B-5-825.

ARGUMENT

POINT I

IN LIGHT OF APPLICABLE UTAH LAW LIMITING THE MONTHLY RESIDENTIAL WATER SERVICE FEES AND INTEREST CHARGABLE BY A SPECIAL SERVICE DISTRICT TO $200, THE TRIAL COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT MR. BENNION WAS LIABLE TO NFSSD FOR EXCESS WATER USAGE FEES AND INTEREST.

In both his motion to dismiss and again in his opposition to NFSSD's motion for summary judgment, Mr. Bennion asked the trial court to consider several applicable statutes prescribing a $200 limit on monthly water service fees and interest that NFSSD was permitted to charge to its residential customers. Irrespective of that request, the trial court deemed those statutes inapplicable and awarded NFSSD summary judgment for service fees and interest in the amount of $156,485.60, for the four year period of February 28, 2004 through March 31, 2009. The trial court incorrectly interpreted the application of those statutes to this case.

Summary judgment is warranted only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. UTAH R. CIV. P. 56(c). "In reviewing a grant of summary judgment, [an appellate court] give[s] the court's legal decisions no deference, reviewing for correctness." *Davis County Solid Waste Mgmt.*, 2002 UT 60, ¶ 9. "Specifically, a district court's interpretation of a

statutory provision is a question of law that [an appellate court] review[s] for correctness." *Id.*

"When faced with a question of statutory interpretation, [an appellate court's] primary goal is to evince the true intent and purpose of the Legislature." *State v. Parduhn*, 2011 UT 57, ¶ 21, 266 P.3d 765 (internal quotation marks omitted); *see also Bd. of Educ. Of Jordan Sch. Dist. v. Sandy City Corp.*, 2004 UT 37, ¶ 8, 94 P.3d 234. (The Utah Supreme Court's "aim in construing a statute is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve."). "To discern legislative intent, [an appellate court] first looks to the plain language of the statute." *Parduhn*, 2011 UT 57, ¶ 21. "As part of [its] plain language analysis, [an appellate court] read[s] the language of the statute as a whole and also in its relation to other statutes." *Id.*; *see also Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592 (An appellate court "read[s] the plain language of the statute as a whole, and interpret[s] its provision in harmony with other statutes in the same chapter and related chapters.").

A. <u>The Trial Court Erred by Not Applying the Special Service District Fee Limitations of UTAH CODE ANN. § 17B-2-804 to this Case</u>.

One of the applicable and binding statutes that was in effect during the period of this case (i.e. February 28, 2004 through March 31, 2009), is UTAH CODE ANN. § 17B-2-804, which was enacted on May 3, 2004. *See* UTAH CODE ANN. § 17B-2-804 (2004). The clear legislative intent of Section 17B-2-804 is to limit the amount of past due

service fees and interest that can be charged to a service district's residential customer. Section 17B-2-804 states in relevant part:

> (3) (a) A local district may file a civil action against the customer if the customer fails to pay the past due service fees and collection costs within 30 calendar days from the date on which the local district mailed notice under Subsection (1)(b).
>
> (b) (i) In a civil action under this Subsection (3), a customer is liable to the local district for an amount that:
>
> (A) consists of past due *service fees*, collection costs, *interest*, court costs, a reasonable attorney's fee, and damages; and
>
> (B) *if the customer's property is residential, may not exceed $200.*
>
> (ii) Notwithstanding Subsection (3)(b)(i), a court may, upon a finding of good cause, waive interest, court costs, the attorney's fee, and damages, or any combination of them.

UTAH CODE ANN. § 17B-2-804(3)(a) (2004) (emphasis added). Admittedly, section 17B-2-804 was repealed on April 30, 2007. *See id.* However, this Court has previously declared that "[a]s a general rule, a party is entitled to have its rights determined on the basis of the law as it existed at the time of the occurrence[.]" *OSI Indus. v. Utah State Tax Comm'n*, 860 P.2d 381, 383 (Utah App. 1993). Accordingly, from the date it was enacted on May 3, 2004, until the date it was repealed on April 30, 2007, Section 17B-2-804(3)(a)and its $200 service fee and interest limitation is effective as to this case.

The applicability of Section 17B-2-804 is not hindered by the fact that its plain language states that it applies to "local districts," as opposed to "special districts" like

NFSSD. In addition to enacting Section 17B-2-804, on May 3, 2004 the Utah Legislature also enacted UTAH CODE ANN. § 17A-1-205 (2004), which states:

> Each special district under this title is subject to the provisions of Title 17B, Chapter2, Part 8, Collection of Water and Sewer Service Fees, to the same extent as if the special district were a local district under Title 17B, Chapter 2, Local Districts.

UTAH CODE ANN. § 17A-1-205 (2004). A plain language reading of Section 17A-1-205 together with Section 17B-2-804 reveals that during the time of Section 17B-2-804's three-year life in the Code of the State of Utah, the Utah Legislature intended that special districts such as NFSSD comply with Section 17B-2-804's provisions. *See Parduhn*, 2011 UT 57, ¶ 21.

In particular, From May 3, 2004 through April 30, 2007, NFSSD was prohibited by Section 17B-2-804 from charging Mr. Bennion, a residential customer, more than $200 per month for past due water service fees and interest. Thus, the maximum amount of service fees and interest that NFSSD should have been entitled to for that three-year span was $7,200 ($200 multiplied by 36 months). Significantly, however, for that same three-year period of time (i.e. May 3, 2004 through April 30, 2007), on summary judgment the trial court found that NFSSD was entitled to judgment as a matter of law and awarded NFSSD approximately $80,486.56 in water service fees as well as 12% in interest charges. *See* R. 186. Upon receipt of judgment, NFSSD calculated its total interest (including that three-year period) as amounting to $61,155.22. Given the trial court's failure to correctly interpret and apply Section 17B-2-804, this case should be

reversed and remanded to the trial court for re-adjustment of the past due service fees awarded to NFSSD for the period of May 3, 2004 through April 30, 2007, consistent with the limitations prescribed by Section 17B-2-804.

B. The Trial Court Erred By Not Limiting NFSSD's Interest Charges From May 5, 2008 to the Present to $200 per Month, Consistent with UTAH CODE ANN. § 17B-1-904.

In rendering summary judgment in favor of NFSSD, the trial court failed to apply the $200 monthly interest limitation as prescribed by UTAH CODE ANN. § 17B-1-904, to the 12% interest on unpaid base user fees and water overuse fees awarded to NFSSD for the period of May 8, 2008 to the present. A brief examination of the historical background of Section 17B-1-904 reveals the trial court's error.

On April 30, 2007, the date that Section 17B-2-804 was repealed, the Utah Legislature enacted UTAH CODE ANN. § 17B-1-904, which contains the same language from subsections (2) through (7) of Section 17B-2-804 including the $200 limitation on fees and interest as cited above. *Compare* UTAH CODE ANN. § 17B-2-804 (2004) *with* UTAH CODE ANN. § 17B-1-904 (2007). Section 17B-1-904 is still the law today.[2] *See*

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[2] In relevant part Section 17B-1-904 states:

> (5) (a) A local district may file a civil action against the customer if the customer fails to pay the past due service fees and collection costs within 30 calendar days from the date on which the local district mailed notice under Subsection (2)(b).
> (b) (i) In a civil action under this Subsection (5), a customer is liable to the local district for an amount that:

UTAH CODE ANN. § 17B-1-904 (2011). Like its predecessor statute (Section 17B-2-804), Section 17B-1-904 expressly applies to "local districts." *Id.*

On April 30, 2007, after having repealed Section 17A-1-205, which expressly makes the fee limitations of Section 17B-2-804 applicable to special service districts such as NFSSD, the Utah Legislature did not enact another similar statute. Realizing its mistake, a year later on May 5, 2008, the Legislature enacted UTAH CODE ANN. § 17D-1-106. *See* UTAH CODE ANN. § 17D-1-106 (2011). In no uncertain language, Section 17D-1-106 states that "[a] special service district is, to the same extent as if it were a local district, subject to and governed by . . . (g) Title 17B, Chapter 1, Part 9, Collection of Service Fees and Charges." *Id.* This change evinced the Utah Legislature's clear intent that the $200 fee and interest limitation provisions of Section 17B-1-904 apply to interest charged by a special service district to its residential customer.

Here, the trial court awarded NFSSD 12% per annum interest in the amount of $61,155.22. That interest was accruing for the period of April 30, 2004 through June 8, 2011, on the trial court's award to NFSSD of $99,041.38, which includes base user fees of $3,711.00 and excess water fees of $95,330.38. Additionally, the trial court awarded

---

> (A) consists of past due service fees, collection costs, *interest*, court costs, a reasonable attorney's fee, and damages; and
> (B) *if the customer's property is residential, may not exceed $200.*
> (ii) Notwithstanding Subsection (5)(b)(i), a court may, upon a finding of good cause, waive interest, court costs, the attorney fee, and damages, or any combination of them.

UTAH CODE ANN. § 17B-1-904(5) (2011) (emphasis added).

NFSSD continuing 12% interest on the total judgment amount until it is paid in full. The trial court's award of interest from the period of May 5, 2008, when Section 17D-1-106 was enacted, to the present was clearly in error. Pursuant to the limitations prescribed by Section 17B-1-904, the most that NFSSD could collect in interest for that period of time is $200 per month. *See* UTAH CODE ANN. §§ 17D-1-106 (2011) and 17B-1-904 (2011). Because of that error of law, the trial court's summary judgment should be reversed and a remand issued for re-adjustment of the interest awarded to NFSSD for the period of May 5, 2008 to the present, consistent with the limitations prescribed by Section 17B-1-904.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT MR. BENNION WAS RESPONSIBLE AS A MATTER OF FACT AND LAW TO MAINTAIN AND REPAIR THE LEAKS IN THE PROPERTY'S LATERAL WATERLINE, AND IN REQUIRING MR. BENNION TO PAY OVERUSE CHARGES RELATED TO THOSE LEAKS.

In its Findings of Fact and Conclusions of Law granting NFSSD's motion for summary judgment, the trial court found that Mr. Bennion, and not NFSSD, was responsible for the maintenance of the Property's lateral waterline. However, the evidence provided to the trial court and Utah law clearly demonstrates that NFSSD was responsible for that maintenance pursuant to an easement that NFSSD obtained on September 26, 2006. Accordingly, the trial court erred assigning to Mr. Bennion the cost/duty of maintenance for the Property's lateral waterline, and also erred in awarding NFSSD more than $41,728.14 in damages related to water overuse charges resulting from the lack of maintenance for that line.

An appellant challenging the sufficiency of the trial court's findings of fact has a duty to first marshal all of the record evidence in support of the court's findings. UTAH R. APP. P. 24(a)(9). Next, an appellant must "demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings." *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985).

The relevant evidence presented to the trial court in the instant case is as follows:

- At all times relevant to this action, Mr. Bennion owned the Property, which is located within the Boundaries of NFSSD (R. 412);
- For the period of February 29, 2004 through March 31, 2009, NFSSD continuously provided the Property with water services (R. 411-12);
- NFSSD is responsible for the maintenance of the main waterlines of its water delivery system (R. 411);
- Typically, NFSSD is not responsible for maintenance of lateral waterlines that connect to the main waterlines of NFSSD's water delivery system (*id.*);
- Generally, individual property owners are responsible for the maintenance of lateral waterlines servicing their properties (*id.*);
- Prior to November 1997 through March 31, 2009, Mr. Bennion was the owner of the lateral waterline from the point it connects to NFSSD's main waterline at a meter box located north of the Property to the meter box south of the Property, which southerly meter box is located on a property adjacent to the Property (R. 410-11);
- In 1998, Mr. Bennion shut off the water valve to his Property and did not use water at his Property from that time on (R. 77);
- In the past, Mr. Bennion refused to allow NFSSD's representatives onto the Property to fix and service the Property's lateral waterline, but that incident occurred well before the time period at issue in this case (R. 253-54, 410);

- The leaks that may have contributed to the excess water usage through the Property's lateral waterline were remedied after NFSSD obtained an easement to enter into the Property for the purpose of fixing and replacing the lateral waterline (R. 102-05, 225-28, 410);

- On September 26, 2006, NFSSD obtained an easement for immediate occupancy from Judge Anthony Schofield in Case No. 060401631, which easement was granted for the purpose of permitting NFSSD to stop and repair excessive water leaks in the Property's lateral waterline (R. 225-28);

- In his Ruling, Judge Schofield found that the lateral waterline that crosses the Property is leaking and losing hundreds of gallons of water each week (R. 228);

- Further, Judge Schofield noted NFSSD's representations that it was not planning to repair the existing waterline, but rather that it planned to install a new waterline, and that a new waterline could not be installed before winter and would require that NFSSD immediately make emergency repairs to Mr. Bennion's lateral waterline (R. 226);

- Acting under the belief that the granting of NFSSD's request for an easement would be the best way to halt additional water loss, Judge Schofield granted NFSSD the right to immediate occupancy of Mr. Bennion's Property through which Mr. Bennion's waterline travels (R. 224-25);

- Judge Schofield held that whether NFSSD begins construction for replacement of the waterline immediately or simply uses the Order of Immediate Occupancy to begin preliminary repair work on the existing lateral waterline is within NFSSD's discretion (R. 226);

- NFSSD's invoices demonstrate that that its repairs to Mr. Bennion's lateral waterline occurred in October 2007, the last date that NFSSD charged Mr. Bennion for water overuse fees (*See* R. 173-75); and

- Mr. Bennion continued to be charged water overuse fees from September 26, 2006, the date that NFSSD was granted an easement to repair or replace the Property's leaking lateral waterline, through March 31, 2009, which amount approximately totals $41,728.14 ($27,512.32 charge for water used over base amount from October 2006 to April 2007 plus $14,215.82 charge for water used over base amount from May to October 2007), exclusive of interest charges (*See id.*).

The law in Utah with respect to maintenance obligations on easements between dominant (the easement grantee) and servient (the easement grantor) estates is established by long-standing precedent. In *Stevens v. Bird-Jex Co.*, 18 P.2d 292 (Utah 1933), the court discussed the relative obligations of the dominant and servient estates as follows:

> The general rule governing the respective rights of the owners of the dominant and the servient estates is stated in 19 C.J. 977, § 877, as follows:
>
> > The owner of the servient estate may use his property in any manner and for any purpose consistent with the enjoyment of the easement, and the owner of the dominant estate cannot interfere with this use."
>
> He may himself use the way, or permit others to do so, subject to the limitation that his use or the use of his permittee must not be such as to impair the enjoyment of the easement by the owner of the dominant estate, or subject him to extra expense in keeping it in repair, and it is not necessary that he expressly reserve any such right.

Stevens, 18 P.2d at 295.

Additionally, the longstanding case of *Nielson v. Sandberg*, 141 P.2d 696 (Utah 1943), dictates that NFSSD is required to maintain its easement regardless of the use or nonuse of the Property by Mr. Bennion. In *Nielson*, the Utah Supreme Court declared that "[t]he owner of such an easement over lands of another is required 'to keep up, maintain, and protect his easement or right way[.]'" *Id.* at 702 (citations and quotations omitted). Additionally, the Court announced that "'[o]ne acquiring an easement and right to travel over the lands of another not only assumes the burden of maintenance of said right of way, but all other burdens incident to the use.'" *Id* (citations omitted).

Significantly, the *Neilson* Court also affirmed that "[t]he landowner is not liable for damages caused by ordinary use of the land by him." *Id.*

Because NFSSD was granted an easement by Judge Schofield, Utah law prescribes a legal duty upon NFSSD to maintain its easement. The evidence provided to the trial court clearly demonstrates that from September 26, 2006 through October 2007, NFSSD failed to maintain its easement, and that NFSSD was awarded over $41,728.14 in water overuse charges against Mr. Bennion. Those charges are the direct result of NFSSD's failure to maintain its easement.

The evidence placed before the trial court shows that the extensive water overuse charges demanded by NFSSD pertain only to leaks in Mr. Bennion's waterline. The trial court was notified that in 1998 Mr. Bennion shut off the water to his Property, and did not use the water after that point. Further, the trial court had before it Judge Schofield's September 26, 2006 Ruling finding that Mr. Bennion's "pipe is leaking and losing hundreds of gallons of water each week." R. 103. That Ruling also established an easement of immediate occupancy in favor of NFSSD for the purpose of stopping and repairing the leaks, which easement was effective as of the date of the Ruling on September 26, 2006.

The date of NFSSD's grant of easement falls squarely within the period of time for which NFSSD was seeking to collect water overuse fees from Mr. Bennion in the instant case. According to the invoices NFSSD provided to the court the water overuse charges ceased in October 2007, signaling to the court that this was the date that NFSSD actually

made its repairs to Mr. Bennion's lateral waterline. Accordingly, from September 26, 2006 to October 2007, NFSSD permitted the lateral waterline to leak, and despite its legal duty to maintain its easement and its representation to Judge Schofield that it would immediately make the requisite repairs to stop the leaks, NFSSD charged Mr. Bennion $41,728.14 plus interest for the water that leaked from the Property's lateral waterline.

In light of that substantial evidence and of longstanding Utah law requiring NFSSD to maintain its easement, the trial court erred in finding that Mr. Bennion was responsible to maintain and repair the leaks in the Property's lateral waterline, and in requiring Mr. Bennion to pay water overuse charges related to those leaks. Where the facts and law do not support the trial court's summary judgment, the court's ruling in that matter should be reversed and remanded for further proceedings.

POINT III

BECAUSE MR. BENNION'S DEFENSES ARE MERITORIOUS, THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO NFSSD UNDER UTAH CODE ANN. § 78B-5-825.

In addition to damages for water overuse fees and interest, the trial court also awarded NFSSD attorney's fees in the amount of $11,362.50. The court's award was based on its finding that Mr. Bennion committed bad faith in litigation under UTAH CODE ANN. § 78B-5-825. Where Mr. Bennion's defenses are meritorious, the trial court erred in awarding attorney's fees to NFSSD pursuant to Section 78B-5-825.

Section 78B-5-825 provides for an award of attorney fees to a plaintiff if the defendant's defense was both (1) "without merit" and (2) "not brought or asserted in

good faith." UTAH CODE ANN. § 78B-5-825 (2008). "[W]hether a claim is 'without merit' is a question of law [an appellate court] review[s] for correctness." *In re Olympus Constr., L.C.*, 2009 UT 29, ¶ 8. Where an appellate court finds as a matter of law that a party's claim has merit, it need not reach the second factual "bad faith" element of Section 78B-5-825. *Id.* at n. 1. In determining whether there is merit to a claim, an appellate court focuses on whether the claim was "'frivolous'" or "'of little weight or importance having no basis in law or fact.'" *Warner v. DMG Color, Inc.*, 2000 UT 102, ¶ 22, 20 P.3d 868 (quoting *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983).

The arguments specified in Points I and II above demonstrate that Mr. Bennion's defenses to NFSSD's motion for summary judgment were not frivolous and have a legitimate basis in law and fact. In the trial court, Mr. Bennion asserted that NFSSD's service fees and interest damages for the period of May 3, 2004 through April 30, 2007 must be reduced to $200 per month pursuant to the applicable requirements of Sections 17B-2-804 and 17A-1-205, which were in effect at that time. Similarly, Mr. Bennion also argued that Sections 17B-1-904 and 17D-1-106, which limit the interest charges in this case from May 8, 2008 to the present to the amount of $200 per month, constitute binding law. Lastly, in light of NFSSD's easement previously awarded by Judge Schofield, Mr. Bennion argued to the trial court that NFSSD should be responsible to maintain its easement by repairing and/or replacing the Property's leaking lateral waterline. In its decisions, the trial court overlooked each of these arguments.

As is demonstrated above, Mr. Bennion's arguments are clearly based in sound fact and law, and therefore, are not frivolous. Furthermore, these arguments are weighty in that they stand to save Mr. Bennion approximately $150,000.00 in service fees and interest. Because Mr. Bennion's claims have merit, the trial court erred in awarding NFSSD $11,362.50 in attorney's fees pursuant to Section 78B-5-825.

CONCLUSION

Based upon the foregoing, Mr. Bennion respectfully requests that this Court reverse the trial court's summary judgment and remand the case for further proceedings.

Respectfully submitted this 13th day of March 2012.

WRONA LAW FIRM, P.C.

JEFFREY T. COLEMERE
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that on the 13th day of March, 2012, I served a copy of the foregoing **BRIEF OF APPELLEE** on each of the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Kasey L. Wright
Melissa K. Mellor
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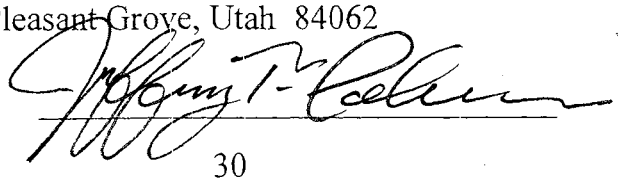

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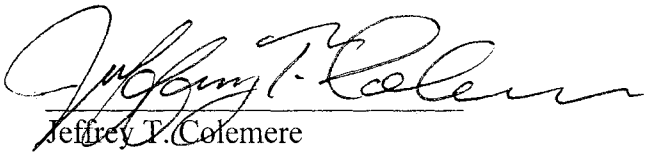

Jeffrey T. Colemere

Dated: March 13, 2012

ADDENDA

ADDENDUM A

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2004 FOURTH SPECIAL SESSION ***
*** ANNOTATIONS CURRENT THROUGH 2005 UT 7, 2005 UT APP 37 ***
*** AND JANUARY 27, 2005 (FEDERAL CASES) ***

TITLE 17A. SPECIAL DISTRICTS
CHAPTER 1. GENERAL PROVISIONS
PART 2. COMPLIANCE WITH OTHER ACTS

Utah Code Ann. § 17A-1-205 (2004)

§ 17A-1-205. Special districts subject to local district provisions relating to collection of water and sewer service fees

Each special district under this title is subject to the provisions of Title 17B, Chapter 2, Part 8, Collection of Water and Sewer Service Fees, to the same extent as if the special district were a local district under Title 17B, Chapter 2, Local Districts.

HISTORY: C. 1953, 17A-1-205, enacted by L. 2004, ch. 316, § 3.

NOTES: EFFECTIVE DATES. --Laws 2004, ch. 316 became effective on May 3, 2004, pursuant to Utah Const., Art. VI, Sec. 25.

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2007 FIRST SPECIAL SESSION ***
*** AND THE NOVEMBER 2007 ELECTION ***
*** ANNOTATIONS CURRENT THROUGH 2008 UT 5 (2/1/2008); 2008 UT APP 43 ***
*** (2/14/2008) AND JANUARY 1, 2008 (FEDERAL CASES) ***

TITLE 17A. LOCAL GOVERNMENT CONTROLLED DISTRICTS
CHAPTER 2. INDEPENDENT DISTRICTS
PART 13. SPECIAL SERVICE DISTRICTS

Utah Code Ann. § 17A-2-1320 (2007)

§ 17A-2-1320. Fees or charges -- Penalties for delinquencies

(1) (a) Except as provided in Subsection (3), the governing authority of a service district may enact a resolution or ordinance that imposes fees or charges for any commodities, services, or facilities provided by the service district.

(b) (i) The governing authority may collect those fees or charges, and may pledge all or part of the revenues from those fees and charges to the payment of any bonds issued by the service district, whether the bonds are issued as revenue bonds, guaranteed bonds, or as general obligations of the district.

(ii) When revenue bonds are issued payable solely from the fees and charges authorized by this subsection, the fees and charges shall be sufficient to carry out any provisions of the resolution or ordinance authorizing the issuance of the revenue bonds, including provisions for payment of the principal of and interest on the bonds, the operation and maintenance of the facilities, and the establishment and maintenance of appropriate reserve funds while these bonds are outstanding.

(2) (a) The governing authority may adopt rules to assure the proper collection and enforcement of all fees and charges imposed by this section.

(b) (i) The governing authority may assess and collect penalties and interest if the fees and charges are not paid when due.

(ii) Any penalty or interest on delinquent charges assessed under the authority of this subsection shall be the same as applied to delinquent real property taxes for the year in which the fee or charge became delinquent.

(c) When more than one commodity, service, or facility is furnished by the district, the fees and charges for all commodities, services, and facilities may be billed to the user in a single bill.

(d) All or any of the commodities, services, and facilities furnished to a user by the service district may be suspended if any fees or charges due the service district are not paid in full when due.

(3) A special service district that provides jail service as provided in Subsection 17A-2-1304(1)(a)(x) may not impose any fee or charge under this section for the service it provides.

HISTORY: C. 1953, 11-23-19, enacted by L. 1975, ch. 116, § 19; 1988, ch. 19, § 1; renumbered by L. 1990, ch. 186, § 655; 2001, ch. 195, § 3.

NOTES: AMENDMENT NOTES. --The 2001 amendment, effective April 30, 2001, added the exception at the beginning of the section and added Subsection (3).

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2007 FIRST SPECIAL SESSION ***
*** AND THE NOVEMBER 2007 ELECTION ***
*** ANNOTATIONS CURRENT THROUGH 2008 UT 5 (2/1/2008); 2008 UT APP 43 ***
*** (2/14/2008) AND JANUARY 1, 2008 (FEDERAL CASES) ***

TITLE 17B. LIMITED PURPOSE LOCAL GOVERNMENT ENTITIES -- LOCAL DISTRICTS
CHAPTER 1. PROVISIONS APPLICABLE TO ALL LOCAL DISTRICTS
PART 9. COLLECTION OF SERVICE FEES AND CHARGES

Utah Code Ann. § 17B-1-904 (2007)

§ 17B-1-904. Collection of service fees

(1) As used in this section:

(a) "Collection costs" means an amount, not to exceed $ 20, to reimburse a local district for expenses associated with its efforts to collect past due service fees from a customer.

(b) "Customer" means the owner of real property to which a local district has provided a service for which the local district charges a service fee.

(c) "Damages" means an amount equal to the greater of:

(i) $ 100; and

(ii) triple the past due service fees.

(d) "Default date" means the date on which payment for service fees becomes past due.

(e) "Past due service fees" means service fees that on or after the default date have not

been paid.

(f) "Prelitigation damages" means an amount that is equal to the greater of:

(i) $ 50; and

(ii) triple the past due service fees.

(g) "Service fee" means an amount charged by a local district to a customer for a service, including furnishing water, providing sewer service, and providing garbage collection service, that the district provides to the customer's property.

(2) A customer is liable to a local district for past due service fees and collection costs if:

(a) the customer has not paid service fees before the default date;

(b) the local district mails the customer notice as provided in Subsection (4); and

(c) the past due service fees remain unpaid 15 days after the local district has mailed notice.

(3) If a customer has not paid the local district the past due service fees and collection costs within 30 days after the local district mails notice, the local district may make an offer to the customer that the local district will forego filing a civil action under Subsection (5) if the customer pays the local district an amount that:

(a) consists of the past due service fees, collection costs, prelitigation damages, and, if the local district retains an attorney to recover the past due service fees, a reasonable attorney fee not to exceed $ 50; and

(b) if the customer's property is residential, may not exceed $ 100.

(4) (a) Each notice under Subsection (2)(b) shall:

(i) be in writing;

(ii) be mailed to the customer by the United States mail, postage prepaid;

(iii) notify the customer that:

(A) if the past due service fees are not paid within 15 days after the day on which the local district mailed notice, the customer is liable for the past due service fees and collection costs; and

(B) the local district may file civil action if the customer does not pay to the local district the past due service fees and collection costs within 30 calendar days from the day on which the local district mailed notice; and

(iv) be in substantially the following form:

Date:

To:

Service address:

Account or invoice number(s):

Date(s) of service:

Amount past due:

You are hereby notified that water or sewer service fees (or both) owed by you are in default. In accordance with Section 17B-1-902, Utah Code Annotated, if you do not pay the past due amount within 15 days from the day on which this notice was mailed to you, you are liable for the past due amount together with collection costs of $ 20.

You are further notified that if you do not pay the past due amount and the $ 20 collection costs within 30 calendar days from the day on which this notice was mailed to you, an appropriate civil legal action may be filed against you for the past due amount, interest, court costs, attorney fees, and damages in an amount equal to the greater of $ 100 or triple the past due amounts, but the combined total of all these amounts may not exceed $ 200 if your property is residential.

(Signed)

Name of local district

Address of local district

Telephone number of local district

(b) Written notice under this section is conclusively presumed to have been given if the notice is:

(i) properly deposited in the United States mail, postage prepaid, by certified or registered mail, return receipt requested; and

(ii) addressed to the customer at the customer's:

(A) address as it appears in the records of the local district; or

(B) last-known address.

(5) (a) A local district may file a civil action against the customer if the customer fails to pay the past due service fees and collection costs within 30 calendar days from the date on which the local district mailed notice under Subsection (2)(b).

(b) (i) In a civil action under this Subsection (5), a customer is liable to the local district for an amount that:

(A) consists of past due service fees, collection costs, interest, court costs, a reasonable attorney fee, and damages; and

(B) if the customer's property is residential, may not exceed $ 200.

(ii) Notwithstanding Subsection (5)(b)(i), a court may, upon a finding of good cause, waive interest, court costs, the attorney fee, and damages, or any combination of them.

(c) If a local district files a civil action under this Subsection (5) before 31 calendar days after the day on which the local district mailed notice under Subsection (2)(b), a customer

may not be held liable for an amount in excess of past due service fees.

(d) A local district may not file a civil action under this Subsection (5) unless the customer has failed to pay the past due service fees and collection costs within 30 days from the day on which the local district mailed notice under Subsection (2)(b).

(6) (a) All amounts charged or collected as prelitigation damages or as damages shall be paid to and be the property of the local district that furnished water or provided sewer service and may not be retained by a person who is not that local district.

(b) A local district may not contract for a person to retain any amounts charged or collected as prelitigation damages or as damages.

(7) This section may not be construed to limit a local district from obtaining relief to which it may be entitled under other applicable statute or cause of action.

HISTORY: C. 1953, 17B-2-801, enacted by L. 2004, ch. 316, § 7; renumbered by L. 2007, ch. 329, § 243.

NOTES: AMENDMENT NOTES. --The 2007 amendment, effective April 30, 2007, renumbered this section, which formerly appeared as § 17B-2-801; added Subsections (2) through (7) and made related changes; substituted "section" for "part" in the introductory language of Subsection (1); substituted "provided a service for which the local district charges a service fee" for "furnished water or provided sewer service" in Subsection (1)(b); and rewrote Subsection (1)(g) to expand the definition of "service fee."

EFFECTIVE DATES. --Laws 2004, ch. 316 became effective on May 3, 2004, pursuant to Utah Const., Art. VI, Sec. 25.

*** STATUTES CURRENT THROUGH THE 2011 THIRD SPECIAL SESSION. ***
*** ANNOTATIONS CURRENT THROUGH 2011 UT 70 (11/08/2011); 2011 UT APP 390 (11/10/2011) AND NOVEMBER 1, 2011 (FEDERAL CASES). ***

TITLE 17B. LIMITED PURPOSE LOCAL GOVERNMENT ENTITIES -- LOCAL DISTRICTS
CHAPTER 1. PROVISIONS APPLICABLE TO ALL LOCAL DISTRICTS
PART 9. COLLECTION OF SERVICE FEES AND CHARGES

Utah Code Ann. § 17B-1-904 (2012)

§ 17B-1-904. Collection of service fees

(1) As used in this section:

(a) "Collection costs" means an amount, not to exceed $ 20, to reimburse a local district for expenses associated with its efforts to collect past due service fees from a customer.

(b) "Customer" means the owner of real property to which a local district has provided a service for which the local district charges a service fee.

(c) "Damages" means an amount equal to the greater of:

(i) $ 100; and

(ii) triple the past due service fees.

(d) "Default date" means the date on which payment for service fees becomes past due.

(e) "Past due service fees" means service fees that on or after the default date have not been paid.

(f) "Prelitigation damages" means an amount that is equal to the greater of:

(i) $ 50; and

(ii) triple the past due service fees.

(g) "Service fee" means an amount charged by a local district to a customer for a service, including furnishing water, providing sewer service, and providing garbage collection service, that the district provides to the customer's property.

(2) A customer is liable to a local district for past due service fees and collection costs if:

(a) the customer has not paid service fees before the default date;

(b) the local district mails the customer notice as provided in Subsection (4); and

(c) the past due service fees remain unpaid 15 days after the local district has mailed notice.

(3) If a customer has not paid the local district the past due service fees and collection costs within 30 days after the local district mails notice, the local district may make an offer to the customer that the local district will forego filing a civil action under Subsection (5) if the customer pays the local district an amount that:

(a) consists of the past due service fees, collection costs, prelitigation damages, and, if the local district retains an attorney to recover the past due service fees, a reasonable attorney fee not to exceed $ 50; and

(b) if the customer's property is residential, may not exceed $ 100.

(4) (a) Each notice under Subsection (2)(b) shall:

(i) be in writing;

(ii) be mailed to the customer by the United States mail, postage prepaid;

(iii) notify the customer that:

(A) if the past due service fees are not paid within 15 days after the day on which the local district mailed notice, the customer is liable for the past due service fees and collection costs; and

(B) the local district may file civil action if the customer does not pay to the local district the past due service fees and collection costs within 30 calendar days from the day on which the local district mailed notice; and

(iv) be in substantially the following form:

Date:

To:

Service address:

Account or invoice number(s):

Date(s) of service:

Amount past due:

You are hereby notified that water or sewer service fees (or both) owed by you are in default. In accordance with Section 17B-1-902, Utah Code Annotated, if you do not pay the past due amount within 15 days from the day on which this notice was mailed to you, you are liable for the past due amount together with collection costs of $ 20.

You are further notified that if you do not pay the past due amount and the $ 20 collection costs within 30 calendar days from the day on which this notice was mailed to you, an appropriate civil legal action may be filed against you for the past due amount, interest, court costs, attorney fees, and damages in an amount equal to the greater of $ 100 or triple the past due amounts, but the combined total of all these amounts may not exceed $ 200 if your property is residential.

(Signed)

Name of local district

Address of local district

Telephone number of local district

(b) Written notice under this section is conclusively presumed to have been given if the notice is:

(i) properly deposited in the United States mail, postage prepaid, by certified or registered mail, return receipt requested; and

(ii) addressed to the customer at the customer's:

(A) address as it appears in the records of the local district; or

(B) last-known address.

(5) (a) A local district may file a civil action against the customer if the customer fails to pay the past due service fees and collection costs within 30 calendar days from the date on which the local district mailed notice under Subsection (2)(b).

(b) (i) In a civil action under this Subsection (5), a customer is liable to the local district for an amount that:

(A) consists of past due service fees, collection costs, interest, court costs, a reasonable attorney fee, and damages; and

(B) if the customer's property is residential, may not exceed $ 200.

(ii) Notwithstanding Subsection (5)(b)(i), a court may, upon a finding of good cause, waive interest, court costs, the attorney fee, and damages, or any combination of them.

(c) If a local district files a civil action under this Subsection (5) before 31 calendar days after the day on which the local district mailed notice under Subsection (2)(b), a customer may not be held liable for an amount in excess of past due service fees.

(d) A local district may not file a civil action under this Subsection (5) unless the customer has failed to pay the past due service fees and collection costs within 30 days from the day on which the local district mailed notice under Subsection (2)(b).

(6) (a) All amounts charged or collected as prelitigation damages or as damages shall be paid to and be the property of the local district that furnished water or provided sewer service and may not be retained by a person who is not that local district.

(b) A local district may not contract for a person to retain any amounts charged or collected as prelitigation damages or as damages.

(7) This section may not be construed to limit a local district from obtaining relief to which it may be entitled under other applicable statute or cause of action.

HISTORY: C. 1953, 17B-2-801, enacted by L. 2004, ch. 316, § 7; renumbered by L. 2007, ch. 329, § 243.

NOTES: AMENDMENT NOTES. --The 2007 amendment, effective April 30, 2007, renumbered this section, which formerly appeared as § 17B-2-801; added Subsections (2) through (7) and made related changes; substituted "section" for "part" in the introductory language of Subsection (1); substituted "provided a service for which the local district charges a service fee" for "furnished water or provided sewer service" in Subsection (1)(b); and rewrote Subsection (1)(g) to expand the definition of "service fee."

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2004 FOURTH SPECIAL SESSION ***
*** ANNOTATIONS CURRENT THROUGH 2005 UT 7, 2005 UT APP 37 ***
*** AND JANUARY 27, 2005 (FEDERAL CASES) ***

TITLE 17B. LIMITED PURPOSE LOCAL GOVERNMENT ENTITIES
CHAPTER 2. LOCAL DISTRICTS
PART 8. COLLECTION OF WATER AND SEWER SERVICE FEES

Utah Code Ann. § 17B-2-804 (2004)

§ 17B-2-804. Collection of past due fees for water or sewer service -- Civil action authorized

(1) A customer is liable to a local district for past due service fees and collection costs if:

(a) the customer has not paid service fees before the default date;

(b) the local district mails the customer notice as provided in Section 17B-2-805; and

(c) the past due service fees remain unpaid 15 days after the local district has mailed notice.

(2) If a customer has not paid the local district the past due service fees and collection costs within 30 days after the local district mails notice, the local district may make an offer to the customer that the local district will forego filing a civil action under Subsection (3) if the customer pays the local district an amount that:

(a) consists of the past due service fees, collection costs, prelitigation damages, and, if the local district retains an attorney to recover the past due service fees, a reasonable attorney's fee not to exceed $ 50; and

(b) if the customer's property is residential, may not exceed $ 100.

(3) (a) A local district may file a civil action against the customer if the customer fails to pay the past due service fees and collection costs within 30 calendar days from the date on which the local district mailed notice under Subsection (1)(b).

(b) (i) In a civil action under this Subsection (3), a customer is liable to the local district for an amount that:

(A) consists of past due service fees, collection costs, interest, court costs, a reasonable attorney's fee, and damages; and

(B) if the customer's property is residential, may not exceed $ 200.

(ii) Notwithstanding Subsection (3)(b)(i), a court may, upon a finding of good cause, waive interest, court costs, the attorney's fee, and damages, or any combination of them.

(c) If a local district files a civil action under this Subsection (3) before 31 calendar days after the day on which the local district mailed notice under Subsection (1)(b), a customer may not be held liable for an amount in excess of past due service fees.

(d) A local district may not file a civil action under this Subsection (3) unless the customer has failed to pay the past due service fees and collection costs within 30 days from the day on which the local district mailed notice under Subsection (1)(b).

(4) (a) All amounts charged or collected as prelitigation damages or as damages shall be paid to and be the property of the local district that furnished water or provided sewer service and may not be retained by a person who is not that local district.

(b) A local district may not contract for a person to retain any amounts charged or collected as prelitigation damages or as damages.

(5) This chapter may not be construed to limit a local district that furnishes water or provides sewer service from obtaining relief to which it may be entitled under other applicable statute or cause of action.

HISTORY: C. 1953, 17B-2-804, enacted by L. 2004, ch. 316, § 10.

NOTES: EFFECTIVE DATES. --Laws 2004, ch. 316 became effective on May 3, 2004, pursuant to Utah Const., Art. VI, Sec. 25.

*** STATUTES CURRENT THROUGH THE 2011 THIRD SPECIAL SESSION. ***
*** ANNOTATIONS CURRENT THROUGH 2011 UT 70 (11/08/2011); 2011 UT APP 390 (11/10/2011) AND NOVEMBER 1, 2011 (FEDERAL CASES). ***

TITLE 17D. LIMITED PURPOSE LOCAL GOVERNMENT ENTITIES -- OTHER ENTITIES
CHAPTER 1. SPECIAL SERVICE DISTRICT ACT
PART 1. GENERAL PROVISIONS

Utah Code Ann. § 17D-1-106 (2012)

§ 17D-1-106. Special service districts subject to other provisions

(1) A special service district is, to the same extent as if it were a local district, subject to and governed by:

(a) Sections 17B-1-105, 17B-1-107, 17B-1-108, 17B-1-109, 17B-1-110, 17B-1-111, 17B-1-112, 17B-1-113, 17B-1-116, 17B-1-118, 17B-1-119, 17B-1-120, and 17B-1-121;

(b) Subsections 17B-1-301(3) and (4), Sections 17B-1-304, 17B-1-305, 17B-1-306, 17B-1-307, 17B-1-310, 17B-1-312, 17B-1-313, and 17B-1-314;

(c) Section 20A-1-512;

(d) Title 17B, Chapter 1, Part 6, Fiscal Procedures for Local Districts;

(e) Title 17B, Chapter 1, Part 7, Local District Budgets and Audit Reports;

(f) Title 17B, Chapter 1, Part 8, Local District Personnel Management; and

(g) Title 17B, Chapter 1, Part 9, Collection of Service Fees and Charges.

(2) For purposes of applying the provisions listed in Subsection (1) to a special service district, each reference in those provisions to the local district board of trustees means the governing body.

HISTORY: C. 1953, 17D-1-106, enacted by L. 2008, ch. 360, § 54; 2009, ch. 181, § 16; 2009, ch. 356, § 6; 2011, ch. 40, § 4; 2011, ch. 106, § 8; 2011, ch. 205, § 5; 2011, ch. 209, § 10.

NOTES: AMENDMENT NOTES. --The 2009 amendment by ch. 181, effective May 12, 2009, added "17B-1-118" in the sections list of (1)(a) and made related changes.
The 2009 amendment by ch. 356, effective May 12, 2009, substituted "governing body" for "governing authority" in (2).
The 2011 amendment by ch. 40, effective May 10, 2011, added § 20A-1-512 to the list in (1) and made related designation changes.
The 2011 amendment by ch. 106, effective May 10, 2011, added "and 17B-1-314" in (1)(b) and made a related change.
The 2011 amendment by ch. 205, effective May 10, 2011, added §§ 17B-1-119, 17B-1-120, and 17B-1-121 to the list of sections in (1)(a).
The 2011 amendment by ch. 209, effective May 10, 2011, added "Subsections 17B-1-301(3) and (4)" in (1)(b).
This section has been reconciled by the Office of Legislative Research and General Counsel.

Laws 2008, ch. 360 became effective on May 5, 2008, pursuant to Utah Const., Art. VI, Sec. 25.

*** STATUTES CURRENT THROUGH THE 2011 THIRD SPECIAL SESSION. ***
*** ANNOTATIONS CURRENT THROUGH 2011 UT 70 (11/08/2011); 2011 UT APP 390 (11/10/2011) AND NOVEMBER 1, 2011 (FEDERAL CASES). ***

TITLE 78B. JUDICIAL CODE
CHAPTER 5. PROCEDURE AND EVIDENCE
PART 8. MISCELLANEOUS

Utah Code Ann. § 78B-5-825 (2012)

§ 78B-5-825. Attorney fees -- Award where action or defense in bad faith -- Exceptions

(1) In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

HISTORY: L. 1981, ch. 13, § 1; 1988, ch. 92, § 1; renumbered by L. 2008, ch. 3, § 857.

NOTES: AMENDMENT NOTES. --The 2008 amendment, effective February 7, 2008, renumbered this section, which formerly appeared as § 78-27-56, and made a stylistic change.

*** Current through rules effective as of December 1, 2011 ***

STATE RULES
UTAH RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT

URCP Rule 56 (2011)

Rule 56. Summary judgment

(a) *For claimant.* -- A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) *For defending party.* -- A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) *Motion and proceedings thereon.* -- The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* -- If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other

relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* -- Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) *When affidavits are unavailable.* -- Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* -- If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

HISTORY: Amended effective November 1, 1997; November 1, 2004

NOTES: Compiler's Notes. -- This rule is similar to Rule 56, F.R.C.P.

ADDENDUM B

Kasey L. Wright, Bar No. 9169
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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
PROVO DEPARTMENT, STATE OF UTAH

NORTH FORK SPECIAL SERVICE DISTRICT, Plaintiff, vs. **ROBERT BENNION,** Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Case No. 080400633 Judge Steven L. Hansen

On June 8, 2011, the Court considered heard argument on Plaintiff's Motion for Summary Judgment. At the hearing, Plaintiff was represented by its attorney, Melissa K. Mellor, of HANSEN WRIGHT EDDY & HAWS, P.C., and Defendant was pro se.

After hearing arguments, reviewing the pleadings on file and evidence presented, this Court issues the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff is a special service district duly organized and authorized pursuant to Utah State Law. *See* Utah Code Ann. § 17B-1-115. (Plaintiff originally organized pursuant to Utah Code Ann. §§ 17A-2-1314 and 17A-2-1320).

2. Plaintiff provides water services, garbage collection services, and fire protection services to properties located within its boundaries. All property owners located within the special service district's boundaries are required to pay a monthly base fee for the services.

3. Plaintiff's Board has also established additional fees and penalties if a North Fork member fails to timely pay the fees established and imposed by Plaintiff, e.g. interest at the rate of 12% per annum on delinquent accounts.

4. Plaintiff is authorized to charge an excess water usage fee to the members who use more than 5,000 gallons during one month. The amount Plaintiff charges North Fork members for excess water usage is based on a graduated scale adopted by Plaintiff's Board.

5. At all times relevant to this action, Bennion owned certain real property located within the boundaries of North Fork previously identified herein as "the Bennion property" or "Bennion's property."

6. Plaintiff has continuously provided the Bennion property with water, garbage collection, and fire protection services for several years, including at all times relevant to this case.

7. Pursuant to Plaintiff's Motion for Summary Judgment, Plaintiff sought payment for services provided from February 29, 2004 through March 31, 2009.

8. Plaintiff customarily and routinely sent invoice statements on a quarterly basis to Bennion during all times relevant to this action.

9. Bennion never voluntarily paid for services provided by Plaintiff.

10. The only payments for services Plaintiff has received on Bennion's account came from extensive litigation and release of a bond previously posted with this Court by Bennion in another action.

11. Bennion is delinquent in paying his monthly base fee for access to water, fire protection, and sanitation services provided by Plaintiff from February 29, 2004 through March 31, 2009 in the amount of Three Thousand Seven Hundred Eleven Dollars ($3,711.00).

12. An account for service fees is considered delinquent when it remains unpaid more than 30 days after the statement date.

13. Plaintiff is responsible for the maintenance of the main water lines of its water delivery system.

14. Plaintiff is not responsible for maintenance of lateral water lines that connect to the main water lines of Plaintiff's water delivery system. Rather, individual property owners are responsible for the maintenance of lateral water lines servicing their properties.

15. Prior to November 1997 through March 31, 2009, Bennion has been the owner of the lateral water line from the point it connects to the Plaintiff's main water line at a meter box located

north of the Bennion property to the meter box south of the Bennion property that is located on a property adjacent to the Bennion property (hereinafter referred to as "the Bennion Lateral Water Line").

16. Bennion is responsible for water taken out of the Bennion Lateral Water Line regardless of whether or not he personally utilizes the water.

17. Bennion refused to allow Plaintiff's representatives on the Bennion property to fix and service the Bennion Lateral Water Line.

18. The leaks that may have contributed to the excess water usage through the Bennion Lateral Water Line were remedied only after Plaintiff obtained injunctive relief to enter the Bennion property to fix and service the water delivery system.

19. Between February 28, 2004 and March 31, 2009, approximately 14,700,268 gallons of water were taken out of Plaintiff's water system by way of the Bennion Lateral Water Line. This is based on meter readings taken between the between the two points of the Bennion Lateral Water Line.

20. The charges for Bennion's excess water usage from February 28, 2004 through March 31, 2009, totals Ninety Five Thousand Three Hundred Thirty and 38/100 Dollars ($95,330.38).

21. Bennion is delinquent in paying for the excess water usage through the Bennion Lateral Water Line.

22. The amount of interest (pursuant to a rate of 12% per annum) based on each delinquent charge added to Bennion's account totals Sixty One Thousand One Hundred Fifty-Five

and 22/100 Dollars ($61,155.22) from April 30, 2004 (date the charges in question on the account first became delinquent) through June 8, 2011.

23. Bennion's actions and continued litigation have been pursued in bad faith, resulting in Plaintiff incurring extensive legal fees to pursue its legal rights.

24. As set forth in Plaintiff's Affidavit of Attorney Fees, Plaintiff incurred attorney fees in the amount of Eleven Thousand Three Hundred Sixty-Two and 50/100 Dollars ($11,362.50). The Court finds such fees to be reasonable.

CONCLUSIONS OF LAW

1. Bennion is the owner of the Bennion Lateral Water Line.

2. Bennion is responsible for the maintenance, including repair of leaks, of the Bennion Lateral Water Line.

3. Bennion is obligated to pay Plaintiff the established fee for the garbage, water, and fire protection services that Plaintiff provided to Bennion between February 28, 2004 and March 31, 2009.

4. Bennion owes Plaintiff the sum of Three Thousand Seven Hundred Eleven Dollars ($3,711.00) for base user fees between February 28, 2004 and March 31, 2009.

5. Bennion owes Plaintiff the sum of Ninety Five Thousand Three Hundred Thirty and 38/100 Dollars ($95,330.38) for excess water usage fees between February 28, 2004 and March 31, 2009.

6. Plaintiff is entitled to interest at the rate of twelve percent (12%) per annum, from

April 30, 2004 through June 8, 2011, for a total interest amount of Sixty One Thousand One Hundred Fifty-Five and 22/100 Dollars ($61,155.22).

7. Plaintiff is entitled to continuing interest at the rate of twelve percent (12%) per annum until the judgment is paid in full.

8. Pursuant to Utah Code Ann. §78B-5-825, Plaintiff is entitled to an award of attorney fees against Bennion in the amount of Eleven Thousand Three Hundred Sixty-Two and 50/100 Dollars ($11,362.50).

DATED this 13 day of Oct., 2011.

BY THE COURT:

ORIGINAL IF IN RED INK
STATE OF UTAH
COURT • UTAH COUNTY

JUDGE STEVEN L. HANSEN
Fourth Judicial District Court

Approved as to form:

ROBERT F. BENNION
Defendant, Pro Se

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT,** postage prepaid by first-class mail, on this 3rd day of October, 2011, to the following:

Robert F. Bennion
3220 Mariner Bay Street
Las Vegas, NV 89117

Melissa K. Miller

NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

To: Robert F. Bennion
3220 Mariner Bay Street
Las Vegas, NV 89117

Re: *North Fork Special Service District v. Robert Bennion.*
Case No. 080400633

Please take notice that the undersigned attorney for Plaintiff will submit the above and foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** to the Fourth Judicial District Court in and for Utah County, Utah for signature upon the expiration of five (5) days from the date of this notice, plus three (3) days for mailing, unless written objection is filed prior to that time pursuant to Rule 7 of the Utah Rules of Civil Procedure.

DATED this 3rd day of October, 2011.

HANSEN WRIGHT EDDY & HAWS, P.C.

Melissa K. Mellor

MELISSA K. MELLOR
Attorney for Plaintiff

ADDENDUM C

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

NORTH FORK SPECIAL SERVICE DISTRICT, Plaintiff, vs. ROBERT BENNION, Defendant.	CASE NUMBER: 060401631 DATED: SEPTEMBER 22, 2006 **RULING** ANTHONY W. SCHOFIELD, JUDGE

This case comes before the court on the motion of the North Fork Special Service District (the "District") for an order of immediate occupancy. Having read the memoranda, heard oral arguments of counsel, and having reviewed the evidence submitted by affidavit, I grant the motion.

BACKGROUND

Currently there is a water pipe that crosses Defendant Robert Bennion's ("Bennion") property and provides water to several users. This pipe is leaking and losing hundreds of gallons of water each week. The District desires to condemn an easement across Bennion's property to install a new water line to better serve the users on the other side of Bennion's property. The District has moved for an order of immediate occupancy to repair the existing pipe and begin preliminary work to install a new water line while the condemnation action is pending.

Bennion opposes this motion, claiming that the District is not likely to eventually obtain the proposed easement and that the reasons for requesting a speedy occupancy are without merit. Bennion also claims that the order of immediate occupancy should not be granted until the District has paid for past use of Bennion's water pipe.

ANALYSIS

As a special service district in Utah, the District has the power of eminent domain. *Utah Code Ann.* § 17A-2-1314(1)(b). The use of eminent domain to provide water to persons is specifically authorized by statute in *Utah Code Ann.* § 78-34-1(5).

The question of whether to grant an order of immediate occupancy is controlled by *Utah Code Ann.* § 78-34-9. The court is required to "take proof by affidavit or otherwise of: (i) the value of the premises sought to be condemned; (ii) the damages that will accrue from the condemnation; and (iii) the reasons for requiring a speedy occupation." *Id.* at § 78-34-9(2). The court should "grant or refuse the motion according to the equity of the case and the relative damages that may accrue to the parties." *Id.*

The Utah Supreme Court has interpreted the predecessor of this statute to require that "the [condemning authority] has the burden of coming forward with the evidence of, and the burden of persuasion to establish its right to condemn." *Utah State Road Commission v. Friberg*, *687* P.2d 821, 832 (Utah 1984) (citing *Tanner v. Provo Bench Canal & Irrigation Co.*, 40 Utah 105, 118 (1911), *aff'd*, 239 U.S. 323 (1915)). The [condemning authority] is required to provide a "*prima facie showing as to* [its] *right to condemn.*" *Id.* at 833.

I first address the argument by Bennion that the motion should not be granted because the District is not likely to obtain the proposed easement. Bennion argues that the District cannot exercise the power of eminent domain to effectively make a gift to a private developer. Bennion

cites a Utah Supreme Court case requiring that public property "not be disposed of other than 'in good faith for adequate consideration.'" *Mem. in Opp'n to Pl's Mot for Order of Immediate Occupancy* 10 (citing *Price Development Co. v. Orem City*, 995 P.2d 1237, 1247 (Utah 2000) (quoting *Sears v. Ogden City*, 533 P.2d 118, 119 (Utah 1975), *aff'd on rehearing*, 537 P.2d 1029 (Utah 1975)). Bennion's argument fails for two reasons.

First, the proposed easement is not being sought for the purpose of benefitting a private developer. Rather, the District is condemning this easement to provide water to several existing and proposed home sites within its service area, an authorized use which falls within the provisions of *Utah Code Ann.* § 78-34-1(5). Second, the District is not providing a gift to anyone in this instance. The District has a duty to provide water service to all home sites within its service area, which is what it seeks to do in this case. Further, it is paying fair consideration for the easement which it is acquiring. There simply is no clear evidence that the purpose being sought by the District is improper in any way.

I turn next to Bennion's argument that the motion should not be granted because there is no need for a speedy occupation. The current pipe is leaking and losing hundreds of gallons of water each week. At oral argument, the District stated that it was not planning to repair the existing pipe, but rather that it planned to install a new water line. The District admitted in oral arguments that it was uncertain whether a new pipe could be installed before winter. It asserted, however, that there is preliminary work that needs to be done immediately.

Bennion suggested several other alternatives in its memorandum, but offered no evidence to suggest that a less intrusive method was available. Whether the District in fact begins construction immediately or simply uses the Order of Immediate Occupancy to begin preliminary work on the property is within the District's discretion. In my judgment, however, and based

upon the evidence presented by affidavit, granting this motion will best serve the purposes of halting the loss of water and providing water to both existing and future home sites in the District's service area.

Finally, I turn to the argument that the motion should not be granted until the District has compensated Bennion for its past use of his water pipe. This argument is barred by *res judicata*. Bennion raised the issue in a prior action and lost, 4th District Case # 040401235.

The District's motion for an Order of Immediate Occupancy is granted.

Pursuant to Rule 7(f)(2), Utah Rules of Civil Procedure, the District's counsel is directed to prepare an appropriate order.

Dated this 22 day of September, 2006.

BY THE COURT:

Anthony W. Schofield

ANTHONY W. SCHOFIELD, JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 25 day of September, 2006:

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LORI WOFFINDEN
CLERK OF THE COURT

By J Christensen
Deputy Clerk